



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**ELC CASE NO. E023 OF 2023**

**VALENTINE**

**HINZANO**

**PONDA.....APPLICANT**

**-VERSUS-**

**ANFUSO**

**FABIO.....1<sup>ST</sup>**

**RESPONDENT**

**THE LAND REGISTRAR KILIFI COUNTY.....2<sup>ND</sup>**

**RESPONDENT**

**RULING**

**1.** We have an application dated 20<sup>th</sup> May, 2025, seeking to have the affected parties granted an opportunity to be heard in **ELC No. E018 of 2024.**

**2.** A preliminary objection (PO) was raised that the affected parties are not parties here and have no *locus standi* to affect the proceedings in any way.

- 3.** We also have a motion dated April 2, 2025, asking the Court to stay the delivery of the Judgment scheduled for April 3, 2025, and to consolidate this suit with **ELC No. E018 of 2024**.
- 4.** The motions were canvassed through written submissions. I acknowledge receipt of submissions from counsel representing the parties herein with appreciation, as they went a long way toward resolving the issues raised in the pending motions.
- 5.** After reviewing the materials and submissions from the parties, I frame the following issues for the Court's determination. Should the affected parties' motion dated May 20 be allowed? Should the Court stay the delivery of judgment scheduled for April 3, 2025? Should the instant suit be consolidated with **ELC No. E018 of 2024**? Who should bear the costs of the motions?
- 6.** Regarding the issue of whether the affected parties should be allowed to ventilate their rights before the motion dated 2nd April 2025, I reckon that the application seems misplaced because the affected parties have no locus standi to stop proceedings in **ELC No. E018 of 2024**, as they are

not parties to these proceedings, and that the pendency of **ELC No. E018 of 2024** cannot serve as the basis for stopping the applicants from moving the motion dated 2nd April 2025, and seeking orders from the Court in the manner they wish.

- 7.** Therefore, the application dated May 20, 2025, is dismissed.
- 8.** On the Application dated April 2, 2025, seeking a stay of judgment pending further directions and the consolidation of this matter with **ELC No. E018 of 2024**.
- 9.** Counsel for the applicant argues that after the suit was withdrawn, the applicant was never personally served with the hearing notice; therefore, the proceedings to date should be set aside, and the applicant should be granted leave to defend, or the proceedings so far should be set aside, allowing the applicant to defend.
- 10.** On consolidation, the counsel for the applicant contends that the issues in these proceedings between the parties herein are similar to those pleaded in **ELC No. E018 of 2024**. The suit properties herein are the same as the properties in question in the case against the applicant herein (plaintiff in **ELC No. E018 of 2024**) and the

respondent herein (10th Defendant in **ELC No. E018 of 2024**). The respondent herein has filed a defense responding to the applicant's plaint in **ELC No. E018 of 2024** on the same grounds as the Counterclaim in these proceedings. The questions of law and fact between the parties herein are similar; hence, it would be in the best interests of justice, without occasioning embarrassment to the Court through duplicity of decisions and in keeping with the saving of judicial time and resources, that these matters (**ELC No. E023 of 2023 and E018 of 2024**) be consolidated.

**11.** The respondent's counsel asserts that following the applicant's withdrawal of the suit and the applicant's act of appearing in person, the applicant was appropriately served with the pleadings, including the counter-claim and the notice of hearing, on 24th May, 2025. It is further contended that the applicant was personally informed by the process server of the scheduled hearing date and acknowledged receipt by signing at the top of the page of the counter-claim, as evidenced by the affidavit of service filed herein dated 27th May, 2024. The applicant, aware of the scheduled hearing on the counter-claim, failed or neglected to

participate in the proceedings, resulting in the first respondent's suit proceeding without opposition or controversion. The first respondent, having testified, marked the conclusion of the first respondent's case in the absence of both appearance and defense from the applicant. Additionally, after withdrawing this current suit, the applicant filed another suit at the Malindi Environment & Land Court, designated as **ELC No. E018 of 2024**, involving different parties, including the first respondent herein, over the same subject matter as in **ELC No. E023 of 2023**. The applicant failed to defend his case in **ELC No. E023 of 2023** and only later became aware that the matter was scheduled for judgment on 3rd April, 2025, as indicated in the proceedings dated 2nd April, 2025, in **ELC No. E018 of 2024**.

**12.** Counsel for the respondent is of the view that there are no sufficient reasons for the Court not to deliver the pending judgment and that no reasonable explanation has been provided for the applicant's failure to defend the matter.

**13.** On consolidation, counsel for the respondent argues that this matter, which is slated for judgment, cannot be

consolidated with a pending one. It will be procedurally impracticable.

**14.** Regarding the issue of suspending the pending judgment and/or setting aside the *ex parte* proceedings leading to the reservation of judgment, the record shows that the applicant was served as per the return of service but failed to attend the hearing or to counter the counterclaim. Instead, the applicant filed a fresh suit, **ELC No. 18 of 2024**, concerning the same subject matter and the same parties.

**15.** The primary principle behind setting aside *ex parte* proceedings held in the absence of one party, just like setting aside an *ex parte* judgment, is to ensure the interests of justice and uphold the right to be heard. Courts generally view *ex parte* orders as temporary and subject to review to prevent a party from being condemned unheard. As held in **Shah v Mbogo & Another [1967] EA 116**, the court's discretion to set aside *ex parte* orders should be used to remedy injustice or hardship resulting from accident, inadvertence, or excusable mistake, rather than to excuse deliberate obstruction or evasion.

- 16.** As held in **Patel v East Africa Cargo Handling Services Ltd [1974] EA 75**, the court emphasizes that discretion should be exercised to ensure a "*just*" result, particularly when a case has not been heard on its merits.
- 17.** After considering the material placed before me, the delivery of the judgment in this matter will address the very issues raised in **ELC No. E018 of 2024**, and the parties here, particularly the affected parties, are enumerated as defendants in the aforesaid suit.
- 18.** To avoid convolution, it will be prudent that the pending judgment be stayed, that the applicant be allowed to defend, and that the proceedings so far taken be heard *de novo*.
- 19.** On the issue of consolidation, to my mind, it will be premature. Counsel for the parties should first check with their clients on how to proceed in an orderly manner in this matter and in **ELC No. E018 OF 2024**
- 20.** Consequently, the application dated 20th May 2025 was dismissed. The application dated 2nd April 2025 was partially allowed, with the delivery of judgment stayed, the *ex parte* proceedings so far taken set aside, to allow the parties to choose which path to take regarding the two matters,

whether to fold one or consolidate in the future, depending on any necessary applications that may be desirable.

**21.** The parties will bear their own costs concerning the motions.

**Dated, signed, and delivered virtually in Nyeri on this 23<sup>rd</sup> day of April, 2026.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Ms. Akwana for the Applicant**

**Ms. Muyaa for the respondent**

**Court Assistant - Ngatia**